IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1051

PARIS ADULT THEATRE I,
Petitioner,

v.

LEWIS R. SLATON, As District Attorney, Atlanta Judicial Circuit, and HINSON McAULIFFE, As Solicitor General of the Criminal Court of Fulton County, Georgia,
Respondents.

PARIS ADULT THEATRE II,
Petitioner,

v.

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BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Lewis R. Slaton, District Attorney, Atlanta Judicial Circuit, and Hinson McAuliffe, Solicitor General, Criminal Court of Fulton County, Respondents, pray that the Application for Writ of Certiorari to the Supreme

Court of Georgia to review the judgment entered in this case on November 18, 1971, be denied.

OPINION BELOW

The decision sought to be reviewed by this Court is reported at 228 Georgia 343 (1971); 185 S.E.2d 768. It is also set out as "Exhibit C" in Petitioner's Petition for Writ of Certiorari.

JURISDICTION

Respondents adopt Petitioner's jurisdictional statement.

QUESTIONS PRESENTED

1. Whether The Two (2) Motion Picture Films Which Are The Subject Matter Of These Proceedings, And Determined By The Supreme Court Of Georgia To Be Obscene, Are Obscene In The Constitutional Sense And Are Therefore Not Protected Expression Under The First Amendment Of The United States Constitution?

2. Does The Determination And Judgment Of The Georgia Supreme Court Finding Each Of The Films To Be Obscene And "Hard Core Pornography" Violate Petitioner's Rights To Procedural And Substantive Due Process Required By The Fifth And Fourteenth Amendments To The Constitution Of The United States?

3. Whether The Procedure Employed In The Adversary Hearing Was Proper And Consistent With First, Fourth, Fifth And Fourteenth Amendments To The Constitution Of The United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents adopt the constitutional and statutory provisions set forth in Appendix "D" of the Petition for Certiorari and, in addition thereto, add Georgia Code Section 26-2011, Public Indecency.

STATEMENT OF THE CASE

Respondents filed a Complaint in the Fulton Superior Court against Paris Adult Theatre I and Paris Adult Theatre II alleging that Defendants were exhibiting and showing to the general public for an admission charge a 16-millimeter motion picture film entitled "It All Comes Out In The End", in one theatre, and a 16-millimeter motion picture film entitled "Magic Mirror" in the other, each of which were alleged to be obscene within the definition of Georgia Code Section 26-2101 and its exhibition prohibited by that section.

In each of the cases Respondents demanded that a Rule Nisi issue and that after a hearing upon the question and issue of obscenity that each of the films be declared obscene and subject to seizure and that the Defendants be temporarily and permanently enjoined from exhibiting the said films within the jurisdiction of the Court. Respondents further prayed for a temporary injunction temporarily restraining and enjoining Defendants from concealing, destroying, altering or removing the motion picture films from the jurisdiction of this Court. A temporary injunction was granted by the Court, and the Defendants were further ordered to have one (1) print each of the films, as they were exhibited on the 28th day of December, 1970, in Court on the 13th day

of January, 1971, together with the proper equipment for viewing the same.

On the 13th day of January, 1971, the films were produced by Defendants after one (1) of the Defendants served had been held in contempt for refusing to furnish the films on the grounds to do so might incriminate him.

The parties stipulated and agreed to waive a jury trial and a preliminary hearing and stipulated that the judgment and order entered by the Trial Judge would be a Final Judgment and Order in each case.

The parties further stipulated that certain photographs, which were taken shortly before the hearing, correctly portrayed the outside of Paris Adult Theatre I and Paris Adult Theatre II, as they existed on December 28, 1970, with the exception of the titles therein exhibited.

Each of the films were exhibited to the Trial Court and to the Supreme Court of Georgia.

Evidence revealed that the theatres carried the legend on the outside that the films were for "Adults Only" and that "You Must Be 21 And Able To Prove It. If Viewing The Nude Body Offends You, Do Not Enter."

Ira W. Brown testified that he viewed the motion picture "It All Comes Out In The End" at the Paris Adult Theatre on December 28, 1970, and paid an admission charge of Three and No/100 ($3.00) Dollars to enter the theatre.

Mr. Brown further testified that there was nothing on the outside that would indicate that acts of fellatio, cunnilingus or group sexual intercourse would be exhibited in that film.

Evidence further revealed that no legend or other type of warning was exhibited outside the theatre which would forewarn the general public as to the contents of the film entitled "Magic Mirror".

Mr. C. R. Little testified that he viewed the film "Magic Mirror" in its entirety on December 28, 1970, and that nothing was exhibited on the outside of the theatre that warned him what the contents of the film would be, other than the fact that adult movies were being shown in the theatre. There was nothing on the outside of the theatre that indicated or suggested that the acts of fellatio or cunnilingus or other erotica were contained in the films so exhibited.

At the conclusion of the evidence the Trial Court took under advisement Motions to Dismiss filed by Respondents and subsequently did sustain the said Motions and dismiss Respondents' Complaint. This judgment was reversed by the Supreme Court of Georgia on November 5, 1971, and petitions for rehearing were denied on November 18, 1971.

REASONS FOR NOT GRANTING THE WRIT

1. THE TWO (2) MOTION PICTURE FILMS WHICH ARE THE SUBJECT MATTER OF THESE PROCEEDINGS, AND DETERMINED BY THE SUPREME COURT OF GEORGIA TO BE OBSCENE, ARE OBSCENE IN THE CONSTITUTIONAL SENSE AND ARE THEREFORE NOT PROTECTED EXPRESSION UNDER THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

The photographs of the outside of Paris Adult Theatres I and II clearly established the total lack of forewarning to prevent potential intrusion into the privacy of

unsuspecting adults who wish to avoid confrontation with erotic material. The modest legend on the exterior of the premises simply provided that the material "Is For Adults Only And You Must Be 21 And Able To Prove It. If Viewing The Nude Body Offends You—Please Do Not Enter."

This legend would not forewarn the public, nor does it even suggest, that the films in question depicted fellatio, cunnilingus, sexual congress, lesbian activities or homosexuality. At most the legend would suggest that the films only portrayed and exhibited nude scenes and pictures, such as are contained in "girlie" magazines, which this Court has ruled are constitutionally permissible under the Doctrine of *Redrup v. New York*, 386 U.S. 767, as explained and construed in *Milky Way Productions, Inc. v. Leary*, 305 Fed. Supp. 288, 293, affirmed 90 S.Ct. 817.

In the Supreme Court of Georgia, Petitioners contended that because of the legend appearing outside the theatre, as hereinabove set forth, the exhibition of the films in this context is permissible; and that the State cannot, without violating First Amendment Rights, constitutionally prohibit it.

They relied in support of this position upon the case of *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, and other federal and state cases following it. *United States v. Reidel*, 402 U.S. 351, 91 S.Ct. 1410, expressly limited the scope of *Stanley* and discredited the decisions which would so expand it.

The myriad of cases relied upon and cited by Petitioners in regard to this point clearly involved interpretation of different statutes, "girlie" magazines and some motion picture films which are, in fact, borderline cases

at the most and the subject matter of which is no way comparable to the motion picture films involved in this case.

For an example, Petitioners cite and rely heavily upon *Burgin v. South Carolina*, 178 S.E. 2d 325, reversed 404 U.S. 806 (1971). The *Burgin* reversal was based upon *Redrup v. New York*. Counsel for the Petitioners in this case was also counsel for *Burgin*. On Page 12 of Petitioners' Petition for a Writ and Argument to this Court *Burgin* urged:

> "It seems perfectly clear that this Court in offering a workable solution for the lower Courts in obscenity litigation, civil or criminal, in rem or in personam, has restricted the determination of obscenity vel nom to *those materials depicting sexual activities.*" (Emphasis Added)

The evidence in *Burgin* consisted of several "girlie" magazines. *Burgin* stated on Page 11 of his Petition for Writ of Certiorari:

> "These publications are indistinguishable from those involved in many of the decisions of the Supreme Court based upon the principles set forth in *Redrup v. New York*, 386 U.S. 767. Take, for example, the materials found not obscene for willing adults in *Bloss v. Dykema*, 389 U.S. 278, as recently as June 1, 1970. *In neither is there any depiction of sexual congress.*" (Emphasis Added)

The Petitions for Writs of Certiorari in *Burgin* and the other cases cited and relied upon by Petitioners in this case themselves distinguish clearly between the material involved in this case and the other cases relied upon.

"Magic Mirror" and "It All Comes Out In The End" depict sexual congress in every manner and method

known to man and are clearly and easily distinguishable from the material involved in *Burgin* or in any of the other cases which were reversed by this Court, per curiam, citing *Redrup* as authority.

In the case of *Wisconsin v. Amato*, 49 Wis. 2d 638; 183 N.W. 2d 29, certiorari denied January 24, 1972, 30 L.Ed. 2d 751, rehearing denied 31 L.Ed. 2d 257, the Supreme Court of Wisconsin held:

> "In support of their contention that the three (3) magazines here involved are, as a matter of law, not obscene, Defendants describe the materials involved in several per curiam *'Redrup Reversals.'* While a few of these cases—notably *Central Magazine Sales Ltd. v. United States* (1967) 389 U.S. 50, 80 S.Ct. 235, 19 L.Ed. 2d 49—may have involved magazines bearing similarity to one of the magazines herein involved, the other cases dealt with books, films and other items bearing no resemblance to the instant materials."

The Court continued:

> "The Appellants contend that the decision in *Redrup* modifies the use and scope of the *Roth-Memoirs Test*. They argue that magazines such as those involved in this case may not serve as a basis for obscenity prosecution unless it can be shown that: (1) They were sold to minors; or (2) They were so obtrusively displayed as to cause unwilling viewers to see them; or (3) They were pandered in the manner described in *Ginzburg*.
>
> We do not agree. *Redrup* is authority only for the proposition that the particular books and magazines there involved were not obscene. We think that if *the Redrup decision was intended to reverse the Roth-Memoirs Test, that obscenity is not constitutionally-protected speech, the Court would have so*

stated in no uncertain terms. (Emphasis Added) ***We conclude that *Redrup* is strictly limited to the question of obscenity of the specific materials there under consideration."

The motion picture film itself is the highest and best evidence of what it contains. *U.S. v. Wild,* 422 Fed. 2d 34, 2d Circuit (1969). Rehearing denied February 2, 1970. Certiorari denied April, 1971, 9 Cr.L. 4046. In *Wild* the Court held that slides depicting nude male, seated or lying facing camera, holding or touching his erect penis, or depicting two (2) nude males in the act of fellatio constituted "hard core pornography".

This Court in the case of *United States v. Reidel,* 91 S.Ct. 1410, 1413, held:

> "But *Roth* has squarely placed obscenity and its distribution outside the reach of the First Amendment, and they remain there today."

The Supreme Court of Georgia in its decision in this case, *Slaton v. Paris Adult Theatre,* 228 Ga. 343; 185 S.E. 2d 768, 769, held:

> "As we view the holding in the *Reidel* case, it is dispositive of the Appellees' contention, and the ruling of the Trial Court that the showing of these films in a commercial theatre under the circumstances shown in this case is constitutionally permissible. The Defendants in this case were making sales and delivery of the films involved in the only practical way in which it could be done, that is, by selling to the public the right to come into their theatre and view the showing of such films. No reason exists why the sale and delivery of these films should be immune to State control any more than the sale and delivery of multiple copies of an obscene book, pamphlet or magazine. Those who choose to pass

through the front door of the Defendant's theatre and purchase a ticket to view the films and who certify thereby that they are more than twenty-one (21) years of age are willing recipients of the material in the same legal sense as were those in the *Reidel* case, who, after reading the newspaper advertisements of the material, mailed an order to the Defendant accepting his solicitation to sell them the obscene booklet involved there. That case clearly establishes once and for all that the sale and delivery of obscene material to willing adults is not protected under the First Amendment."

Georgia Code Annotated 26-2101 is held to be constitutional and within the purview of the First and Fourteenth Amendments to the United States Constitution. *Gable v. Jenkins,* 309 Fed. Supp. 998, affirmed 397 U.S. 592. The motion picture films here involved are clearly obscene in a constitutional sense, and they are not protected expression under the First and Fourteenth Amendments to the United States Constitution. Each of the said films offends every section of Georgia Code Section 26-2101. The Petition for a Writ of Certiorari to the Supreme Court of Georgia should be denied.

2. THE DETERMINATION AND JUDGMENT OF THE GEORGIA SUPREME COURT FINDING EACH OF THE FILMS TO BE OBSCENE AND "HARD CORE PORNOGRAPHY" DOES NOT VIOLATE PETITIONER'S RIGHTS TO PROCEDURAL AND SUBSTANTIVE DUE PROCESS REQUIRED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The Theatres objected to all efforts by the Respondents to introduce evidence of the Roth-Memoirs Tests of Ob-

scenity and should not be allowed to complain of the Trial Court's ruling.

However, the authoritative judicial decisions do not require such evidence in all cases.

The motion picture films themselves are the highest and best evidence of what they contain. *U.S. v. Wild,* 422 Fed. 2d 34; certiorari denied April, 1971, 9 Cr.L. 4046. In the case of *United States v. Robert Brown,* 328 Fed. Supp. 196, United States District Court, Eastern District of Virginia, Norfolk Division, decided June 9, 1971, the Court held at Page 199:

> "The real issue in this case, of course, is whether these two (2) books are actually obscene. The Supreme Court has held, more than once, that obscenity is outside the scope of First Amendment protection." *** "Brown argues that this Court must acquit him because the government presented no expert testimony that the two (2) books are obscene. As authority for this position, Brown relies on *United States v. Klaw,* 350 Fed. 2d 155 (2d Cir. 1965), which does indicate some of the problems involved in determining questions of prurient interest and contemporary community standards. Specifically, the problems include 'how,' 'by whom,' and 'on what basis' these determinations are to be made. *Klaw,* however, is not controlling here, for as the Second Circuit Court of Appeals subsequently pointed out, the particular facts in *Klaw* required such testimony. *United States v. Wild,* 422 Fed. 2d 34 (2d Cir. 1969). The two (2) books named in this indictment appear to be substantially different from the materials discussed in *Klaw.*** Judge Lumbard stated in *Wild,* 'The question of obscenity can be disposed of merely by stating that these slides are unquestionably hard core pornography. *** There is no conceivable claim that these color slides

> have redeeming social value. *** Hard core pornography such as this can and does speak for itself.' 422 Fed. 2d at 35-36. And in *Ginzburg v. United States*, 383 U.S. 463, 465, 86 S.Ct. 942, 944, 16 L.Ed. 2d 31, the Court said that in the cases in which it has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the question."

See also *New York v. Abronovitz*, 310 N.Y. Supp. 2d 698, and *New York v. Buckley*, 320 N.Y. Supp. 2d 91.

In *State v. Carlson*, 192 N.W. 2d 421 (1971), the Court held at Page 425:

> "There is no need for expert assistance for a jury to determine contemporary community standards and whether the film lacks social value. The films speak for themselves as evidence of their obscenity. No amount of testimony by psychoanalysts, psychologists or anthropologists would be any more reliable on the question of whether the films affront contemporary community standards than the opinion of the jurors in this case."

The Court is obliged to make an independent constitutional judgment as to whether the material involved is Constitutionally protected. *Jacobellis v. Ohio*, 378 U.S. 184; 84 S.Ct. 1676.

In the case of *Evans Theatre Corporation, et al. v. Slaton*, 227 Ga. 377, certiorari denied November, 1971, the Court observed:

> "In *Jacobellis v. Ohio*, 378 U.S. 184 (84 S.Ct. 1676, 12 L.Ed.2d 793), in an opinion concurred in by two (2) Justices of the United States Supreme Court, it was stated that the 'contemporary community standards' by which they must determine the issue of the Federal constitutional rights of

those convicted of crimes involving alleged obscene material were national standards. This opinion did not suggest that State courts must have evidence of national standards of decency before them in order to make a determination as to whether material is obscene. The United States Supreme Court in the *Jacobellis* case made its determination as to whether the film there reviewed was obscene under 'national' community standards by viewing the film itself."

Is Not The Supreme Court of Georgia Clothed With The Same Right, Authority And Responsibility To Make Such Determination By Viewing The Material Itself?

The *Evans* case involved the motion picture "I am Curious-Yellow". By an equally divided Court, this Court affirmed *Grove Press, Inc., et al v. Maryland State Board of Censors*, 401 U.S. 480, 91 S.Ct. 966, which decision declared the film "I am Curious-Yellow" obscene.

In *United States v. New Orleans Book Mart, Inc.*, 328 Fed. Supp. 136 (1971), at Page 142:

> "It may be entertaining to satisfy a prurient interest in sex, but that does not constitute redeeming social value. Ultimately, 'redeeming social value' is not found solely on the face (if one can put it that way) of the photographs. It may arise from the use made of them. A photograph depicting actual sexual actions, conventional or unconventional in nature, might serve a useful purpose in the hands of a therapist. But it is implicit in the obscenity statutes that what is permitted for therapeutic use might be proscribed when put to some other purpose. *** Here the material is offered for sale to any adult buyer having the purchase price, not only to therapists and educators. The covers of the publications pander to the prospective purchaser. They are not offered to educate or to enlighten; they are intended to titillate."

In *Wisconsin v. Amato*, 49 Wis. 2d 638, certiorari denied January 24, 1972, 30 L.Ed.2d 751, rehearing denied 31 L.Ed.2d 257, also reported in 183 N.W 2d 29, the Court held on Page 32:

> "The Appellants contend that in the absence of affirmative proof of 'contemporary community standards' through expert testimony, the State cannot prevail. Several cases are cited in support of this contention. However, the Appellants concede that some Courts have held that affirmative proof on the issue of community standards is not necessary in obscenity cases. However, they contend that the decisions are in the minority, most are pre-*Redrup* and in many of them there is a finding that the material involved is hard core pornography, that is, *material which depicts sexual activity*. We believe that the mere existence of the magazines here involved was sufficient without expert testimony to present a jury question. We conclude that expert testimony is not required."

It must therefore logically follow that if the Supreme Court of the United States may, by considering the material alone, hold that certain material is constitutionally protected by the First Amendment, as the Court has so ruled in its many Redrup reversals, then the Supreme Court of Georgia in like manner may find, as a matter of law, that the material and films involved in this case are obscene and are not protected by the First and Fourteenth Amendments to the United States Constitution, without the assistance of expert testimony.

3. THE PROCEDURE EMPLOYED IN THE ADVERSARY HEARING WAS PROPER AND CONSISTENT WITH THE FIRST, FOURTH, FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

After the motion picture films "It All Comes Out In The End" and "Magic Mirror" had been viewed in their entirety, Respondents filed a Complaint against Paris Adult Theatres I and II; and a Rule Nisi was issued by the Fulton Superior Court directing the Theatres to appear on a day certain in order that an adversary hearing could be held to determine the question of obscenity. The Theatres were required to produce one (1) print of each of the motion picture films and the proper equipment for exhibiting the same to the Court. They were restrained only from concealing, altering, mutilating or destroying the said films or removing them from the jurisdiction of the Court.

The procedure employed by the Respondents in this case is far more protective of the Constitutional rights of the Exhibitors than is the procedure in any of the cases cited by the Theatres or suggested in the Petition for Writ of Certiorari, for no restraint whatsoever is placed upon the exhibition of the motion picture films involved until after a hearing is had thereon and the Courts have determined that the material is in fact and in law obscene. Until this determination is made the Exhibitors are free to continue exhibiting the films, as was done in this case; and, therefore, the length of time between the filing of the Complaint and the hearing operates to no detriment to the Exhibitor at all.

This procedure was first established in this District in *Gable v. Jenkins,* 309 Fed.Supp. 998, United States District Court, Northern District of Georgia, Atlanta Division, affirmed 90 S.Ct. 1351, wherein the Court held on Page 1001:

> "There is a proper procedure exisiting in Georgia law that can achieve Constitutional standards, i.e.,

a prior adversary judicial proceeding before the seizure of the allegedly obscene items."

FOOTNOTE 3:

As example, the following are presented: *** An order to show cause why the alleged obscene film is not obscene could be served on the possessor: ***.

This type of procedure was approved in *Metzger v. Pearcy*, 393 Fed.2d 202 (7th Circuit 1968). *Tyrone v. Wilkinson*, 410 Fed.2d 639 (4th Circuit 1969); *Bethview v. Kahn*, 416 Fed.2d 410.

In each of the latter cases the Courts ordered the return of the alleged obscene material seized because no adversary hearing was held prior to the seizure of such materials. However, it is significant to note that the possessor was ordered to make one (1) print available to the State for prosecution purposes.

The procedure employed in the case at bar was approved by the Supreme Court of Georgia in the cases of *1024 Peachtree Corporation, et al v. Slaton*, 228 Ga. 102; 184 S.E.2d 144; *Walters v. Slaton*, 227 Ga. 676; 182 S.E.2d 464 (four cases); *Evans Theatre Corporation v. Slaton*, 227 Ga. 377, 180 S.E.2d 712.

The cases relied upon by the Petitioners are clearly distinguishable from the case at bar. The vice of *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, is not found in the Georgia procedure. *Freedman* involved a Board of Censors. The statute provides that it shall be unlawful to exhibit any motion picture film until the film has been submitted to and approved by the Maryland State Board of Censors.

The Chicago Motion Picture Ordinance involved in *Teitel Film Corporation v. Cusack*, 390 U.S. 139, 88

S.Ct. 754, prohibits the exhibition in any public place of "any picture . . . without having first secured a permit therefor from the Superintendent of Police." If the permit was denied, the burden was on the Exhibitor to pursue the case through a series of Appeal Boards, all the while the picture could not be exhibited.

The same evil was found in *U.S. v. The Book Bin*, 306 Fed. Supp. 1023, affirmed 400 U.S. 410.

The precise question of whether or not obscenity can be controlled by injunction is not new to this Court, and has been decided adversely to Petitioner's contentions. In *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1956), this Court upheld the constitutionality of a New York statute authorizing the injunction of obscene prints and articles by the Supreme Court of New York, without a jury, upon the complaint of the chief executive or legal officer of any city, town or village. In said decision this Court stated:

> "It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. Whether proscribed conduct is to be visited by a criminal prosecution or by a qui tam action or by an injunction or by some or all of these remedies in combination, is a matter within the legislature's range of choice. See *Tigner v. Texas*, 310 U.S. 141, 148. If New York chooses to subject persons who disseminate obscene 'literature' to criminal prosecution and also to deal with such books as deodands of old, or both, with due regard, of course, to appropriate opportunities for the trial of the underlying issue, it is not for us to gainsay its selection of remedies.

The procedure involved in the adversary hearing process employed in this case is fully protective of the Con-

stitutional rights of the Exhibitors, for no restraint whatsoever is placed upon the exhibition of the motion picture film involved until after a hearing is had thereon and the Courts have determined its obscenity. Until such judicial determination, the Exhibitors are free to continue exhibiting the film or films as was done in this case.

The Supreme Court of Georgia found the films to be obscene because they are obscene.

CONCLUSION

For all of the foregoing reasons, Respondents urge this Court to decline to issue a Writ of Certiorari in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States in good standing, and that I have this day deposited in the United States Post Office, Atlanta, Georgia, three (3) copies of the foregoing Brief of Respondents in Opposition to Petition for Writ of Certiorari with first class postage prepaid addressed to Mr. Robert Eugene Smith, Esquire, Suite 507, 102 West Pennsylvania Avenue, Towson, Maryland 21204, and also three (3) copies of the same addressed to Mr. D. Freeman Hutton, Esquire, Suite 2005, 1175 Peachtree Street, N.E., Atlanta, Georgia 30309, counsel of record for Petitioners.

This the 26 day of May, 1972.

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